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Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror

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HUMAN RIGHTS OUTLAWS: NUREMBERG, GENEVA, AND THE GLOBAL WAR ON TERROR

GEORGE J. ANNAS*

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INTRODUCTION

I wonder if they were even familiar with the Nuremberg trials – or with the laws of war, or with the Geneva conventions.¹

International human rights law was born from the ashes of World War II. The most important post–World War II products are the United Nations, the Nuremberg Trials, the Universal Declaration of Human Rights, and the Geneva Conventions of 1949. But that was not the end of the story. International human rights law continued to develop and expand right up to September 11,

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¹ Alberto Mora, General Counsel, U.S. Navy, 2001-2006, *quoted in* Jane Mayer, *The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32, 41.

2001, most notably through the adoption of the International Covenant on Civil and Political Rights² and the Convention Against Torture,³ and the establishment of the International Criminal Court.⁴ With the exception of the criminal court, the United States has consistently led the international human rights movement. September 11 arrested our nation's human rights momentum. Since September 11, our leaders seem to believe that we must barter human rights for security and adopt measures like torture to protect ourselves – measures that, at least since World War II, we had insisted were always and everywhere immoral and illegal.

The President, of course, has more power than any other government official and is the commander in chief of the military. Nonetheless, the United States is a country of laws, and international human rights laws regarding prisoners cannot be ignored or routinely violated without the active cooperation, or at least acquiescence, of lawyers and physicians, including military lawyers and physicians. The thesis of this brief Article is that it would have been impossible for the Bush administration to embrace harsh interrogation amounting to torture, and establish and operate an off-shore interrogation center at Guantanamo, without the active cooperation of lawyers and physicians. I also argue that the lawyers and physicians who counseled or cooperated in using torture, ignoring the Geneva Conventions, and disregarding the Nuremberg principles, can reasonably be labeled human rights outlaws. In Part I, I highlight the participation of civilian administration lawyers in adopting the torture policy (sometimes called “torture lite”), and in Part II, I concentrate on the role of military physicians in force-feeding hunger strikers at Guantanamo. In Part III, I suggest approaches to hold these lawyers and physicians accountable for their actions with the goal of preventing such actions in the future.

I. TORTURE AND INTERNATIONAL HUMAN RIGHTS LAW

A. A “New Kind of War”

In *State of Denial*, Bob Woodward describes the January 18, 2002, White House meeting in which the decision was made not to follow the Geneva Conventions with respect to al Qaeda or the Taliban.⁵ Secretary of State Colin Powell asked the President to honor our commitments to Geneva, and as Woodward observes, he was backed by General Richard Myers, the Chairman of the Joint Chiefs of Staff:

² International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, Hein's No. KAV 2306, 999 U.N.T.S. 171 [hereinafter ICCPR].

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 112 [hereinafter CAT].

⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

⁵ BOB WOODWARD, *STATE OF DENIAL* 86-87 (2006).

"Mr. President," Myers said, "you may notice I'm the only guy here without any backup. I don't have a lawyer." The other [National Security Council] principals had their legal advisors there. "I don't think this is a legal issue. And I understand technically why the Geneva Conventions do not apply to these combatants [regarding POW status]. . . . I got that. But I think there is another issue we need to think about that maybe hasn't gotten enough light."

. . . "You have to remember that as we treat them, probably so we're going to be treated. . . . We may be treated worse, but we should not give them an opening." Terrorists or other future enemies could easily use the U.S. policy against the Taliban as an argument that they too could ignore the Geneva Conventions.⁶

Perhaps the most disastrous mistake in the "global war on terror" has been to designate it a war at all, instead of a police action. War metaphors not only immediately give credibility to the "enemy," but also call for absolute solutions, such as "unconditional surrender," and suggest that the country is in a state of emergency.⁷ And there is more to our metaphorical declaration of war against terror (a method, not an enemy): this was a "new kind of war,"⁸ a war of good versus evil, that required the good guys to adopt, at least temporarily, the methods of the savage evildoers.⁹

⁶ *Id.* Donald Rumsfeld was, from the beginning of his tenure as Secretary of Defense, against having the Generals at the Pentagon rely on the Judge Advocate General's (JAG) Corps, and instead wanted them to rely on his civilian lawyers. The following exchange, between Rumsfeld and Admiral Vern Clark, a candidate for Chairman of the Joint Chiefs of Staff, is illustrative:

The Joint Staff is a national treasure, Clark said, and the secretary tended to undervalue it, even malign it. Clark said that he believed Rumsfeld was dead wrong on that score. Rumsfeld scoffed again. What they provided was not worth the paper it was written on *Why does the chairman need a head of policy, or a spokesman, a liaison to the Congress or a lawyer? . . . "Why shouldn't he use my lawyer?"*

Id. at 67 (emphasis added).

⁷ Cf. George J. Annas, *Reframing the Debate on Health Care Reform by Replacing Our Metaphors*, 332 NEW ENG. J. MED. 744, 745 (1995) (describing the danger of applying a "military metaphor" to healthcare). See generally Ann Mongoven, *The War on Disease and the War on Terror: A Dangerous Metaphorical Nexus?*, 15 CAMBRIDGE Q. HEALTHCARE ETHICS 403 (2006); Mary Robinson, *Law, Language, and Principle in the "War on Terror,"* HUM. RTS., Winter 2006, at 18.

⁸ Remarks in a Telephone Conversation with New York City Mayor Rudolph Giuliani and New York Governor George Pataki and an Exchange with Reporters, 37 WEEKLY COMP. PRES. DOC. 1304, 1305 (Sept. 13, 2001).

⁹ Even before the President used the phrase "new kind of war" to characterize the global war on terror, he had characterized the 9/11 attacks as "acts of war" and had characterized the war as "a monumental struggle of good versus evil," concluding, "but good will prevail." Remarks Following a Meeting with the National Security Team, 37 WEEKLY COMP. PRES. DOC. 1302, 1302 (Sept. 12, 2001).

Three weeks after the White House meeting, on February 7, 2002, the President signed a memorandum on the "Humane Treatment of al Qaeda and Taliban Detainees," which specifically determined that the Geneva Conventions of 1949 would not be applied to al Qaeda and Taliban detainees. The rationale presented in the memorandum, prepared by White House Counsel Alberto Gonzales, was that

the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of States. Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."¹⁰

The White House meeting and the wording of this memorandum provide support for the opinion of Alberto Mora, General Counsel of the Navy, that administration lawyers did not seem to know or care much about either Nuremberg or the Geneva Conventions.¹¹ Had they possessed even a rudimentary knowledge of history, for example, the President and his advisors would have known that the United States was not the first government to use the excuse that engagement in a new kind of war justified suspension of human rights. In his memoir of World War II, Winston Churchill refers to a similar "terrible decision of policy adopted by Hitler" on June 14, 1941, at the outset of the war between Germany and the Soviet Union, which "led to many ruthless and barbarous deeds."¹² Churchill quotes directly from the evidence

¹⁰ Memorandum from President George W. Bush to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 134, 134-35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

¹¹ See *supra* note 2 and accompanying text. It is rudimentary international law that Common Article 3 applies to both internal and international conflicts. See, e.g., *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgement, ¶¶ 140-150 (Feb. 20, 2001). Republican activist and former Associate Deputy Attorney General Bruce Fein has gone even further: "Bruce Fein said that the Bush legal team was strikingly unsophisticated. 'There is no one of legal stature, certainly no one like Bork, or Scalia, or Elliot Richardson, or Archibald Cox It's frightening. No one knows the Constitution – certainly not Cheney.'" Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, *NEW YORKER*, July 3, 2006, at 44, 46 (discussing the role of Cheney's chief legal counsel, David Addington, in promoting the President's power generally and his authorization of torture in particular). In the words of Kenneth Adelman, who served in the Pentagon under Ford, "Cheney's not a lawyer, so he would defer to David [Addington] on the law." *Id.* at 49.

¹² 3 WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: THE GRAND ALLIANCE* 368 (1950); see also Scott Horton, *Through a Mirror, Darkly: Applying the Geneva Conventions to "A New Kind of Warfare,"* in *THE TORTURE DEBATE IN AMERICA* 136, 138 (Karen J.

produced at the Nuremberg Trial, elicited from Generals Franz Halder and Wilhelm Keitel, both of whom were present when Hitler made his decision. Keitel's testimony at Nuremberg includes the following:

The main theme [of Hitler's instructions] was that this was the decisive battle between two ideologies, and that this fact made it impossible to use in this war methods as we soldiers knew them and which were considered to be the only correct ones under International Law. The war could not be carried on by these means. In this case completely different standards had to be applied. This was an entirely new kind of war, based on completely different arguments and principles.¹³

A statement taken during the interrogation of General Halder and entered as evidence at Nuremberg was similar:

At this conference the Führer stated that the methods used in the war against the Russians will have to be different from those used in the war against the West. . . . He said that the struggle between Russia and Germany is a Russian struggle. He stated that since the Russians were not signatories to The Hague Convention, the treatment of their prisoners of war does not have to follow the Articles of the Convention.¹⁴

The point is not that President Bush was acting like Hitler; the point is that the President's advisors seemingly knew nothing of the history of World War II or the opinion of Winston Churchill on the specific subject of their legal advice.¹⁵ Among other things, Common Article 3 of the Geneva Conventions prohibits "cruel treatment and torture" as well as "humiliating and degrading treatment."¹⁶

Greenberg ed., 2006) (observing that "virtually all the arguments played out in the recent internal debate over detainee abuse were also raised and discussed in Germany in the opening phase of the Second World War").

¹³ *Quoted in* THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY pt. 11, at 16 (1947).

¹⁴ *Quoted in* THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY pt. 6, at 310-11 (1946).

¹⁵ The ignorance of history on the part of Bush's legal team has been a frequent subject of commentary. *See, e.g.,* Mayer, *supra* note 11, at 44, 55.

¹⁶ The text of Common Article 3 (called "common" because it appears in all four of the 1949 Geneva Conventions) is:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The issuance of the February 7, 2002, memorandum began the process of institutionalizing torture in the United States. Elaine Scarry is surely correct in noting that the institutionalization of torture in a society requires the active cooperation of doctors and lawyers. In her words,

[I]t is in the nature of torture that the two ubiquitously present [institutions] should be medicine and law, health and justice, for they are the institutional elaborations of body and state. These two were also the institutions most consistently inverted in the concentration camps, though they were slightly differently defined in accordance with Germany's position as a modern, industrialized mass society: the "body" occurring not in medicine but in its variant, the scientific laboratory; the "state" occurring not in the process of law, the trial, but in the process of production, the factory.¹⁷

Torture is a particularly horrible crime, and any role that physicians or lawyers play in conducting or enabling torture has always been difficult to comprehend. As General Telford Taylor, prosecutor at the trial of the Nazi doctors in Nuremberg (the "Doctors' Trial"), explained to the U.S. judges, "To

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Common Article 3].

¹⁷ ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 42 (1985); *see also id.* at 38 ("Brutal, savage, and barbaric, torture (even if unconsciously) self-consciously and explicitly announces its own nature as an undoing of civilization, acts out the uncreating of the created contents of consciousness.").

kill, to maim, and to torture is criminal under all modern systems of law. . . . [y]et these [physician] defendants, all of whom were fully able to comprehend the nature of their acts . . . are responsible for wholesale murder and unspeakably cruel tortures.”¹⁸ Taylor told the judges that the United States was obligated “to all peoples of the world to show why and how these things happened” with the goal of trying to prevent a repetition in the future.¹⁹ The Nazi doctors defended themselves primarily by arguing that they were engaged in necessary wartime medical research and were following the orders of their superiors. These defenses were rejected because they are at odds with the “Nuremberg Principles” articulated in the prior multinational war crimes trial: that there are crimes against humanity (like torture) for which individuals can be criminally responsible and obeying orders is no defense.²⁰

B. *Torture in Wartime*

Sixty years later, the question of torture during wartime and the role of physicians and lawyers in torture is again a source of consternation and controversy. Steven Miles, for example, relying primarily on government documents, concluded that at Abu Ghraib and Guantanamo, “[a]t the operational level, medical personnel evaluated detainees for interrogation, and monitored coercive interrogation, allowed interrogators to use medical records to develop interrogation approaches, falsified medical records and death certificates, and failed to provide . . . basic health care.”²¹ The Red Cross, based on an inspection of Guantanamo in June 2004, alleged that the physical and mental coercion of prisoners at Guantanamo is “tantamount to torture,” and specifically labeled the active role of physicians in interrogations “a flagrant violation of medical ethics.”²² Gregg Bloche and Jonathan Marks interviewed physicians involved in interrogations at Guantanamo and in Iraq, and reported that the physicians believed that “physicians serving in these roles do not act as physicians and are therefore not bound by patient-oriented ethics.”²³ Psychiatrist Robert Jay Lifton suggested that reports from Iraq, Afghanistan, and Guantanamo of U.S. physician involvement in torture echo

¹⁸ Opening Statement of the Prosecution, *United States v. Brandt*, reprinted in *THE NAZI DOCTORS AND THE NUREMBERG CODE* 67, 68 (George J. Annas & Michael A. Grodin eds., 1992).

¹⁹ *Id.*

²⁰ Robert F. Drinan, *The Nuremberg Principles in International Law*, in *THE NAZI DOCTORS AND THE NUREMBERG CODE*, *supra* note 18, at 174, 175, 180 n.2.

²¹ Steven H. Miles, *Abu Ghraib: Its Legacy for Military Medicine*, 364 *LANCET* 725, 728 (2004). Miles expanded and updated this article in his book. STEVEN H. MILES, *OATH BETRAYED: TORTURE, MEDICAL COMPLICITY, AND THE WAR ON TERROR*, at x-xi (2006).

²² Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo: U.S. Rejects Accusations*, *N.Y. TIMES*, Nov. 30, 2004, at A1.

²³ M. Gregg Bloche & Jonathan H. Marks, *When Doctors Go to War*, 352 *NEW ENG. J. MED.* 3, 3 (2005).

stories of the Nazi doctors, who were “the most extreme example of doctors becoming socialized to atrocity.”²⁴ And the muting of criticism of torture prompted Elie Wiesel to ask why the “shameful torture to which Muslim prisoners were subjected by American soldiers . . . [has not] been condemned by legal professionals and military doctors alike.”²⁵

Since World War II, the United States has grown accustomed to being a leader in setting the world standard in always condemning torture as a criminal and inexcusable human rights violation. Nuremberg, for example, was quickly followed by the drafting and adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Article 5 of the UDHR is unequivocal: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁶ The UDHR is a declaration, but it was followed twenty years later by a treaty that the United States has always supported – the International Covenant on Civil and Political Rights (Covenant). Article 7 of the Covenant adopts the language of UDHR’s Article 5 and, inspired by the Doctors’ Trial, adds a sentence: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”²⁷

Many of the provisions to the Covenant can be suspended in a national emergency under the Covenant’s Article 4, which provides in part: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation”²⁸ Nonetheless, Article 4 also provides that there are some obligations under the treaty from which “no derogation” can be taken.²⁹ These obligations include the protection of “the inherent right to life,”³⁰ the prohibition of slavery,³¹ the proscription of ex post facto criminal laws,³² the recognition of legal

²⁴ See Robert Jay Lifton, *Doctors and Torture*, 351 NEW ENG. J. MED. 415, 416 (2004).

²⁵ Elie Wiesel, *Without Conscience*, 352 NEW ENG. J. MED. 1511, 1513 (2005).

²⁶ Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

²⁷ ICCPR, *supra* note 2, art. 7.

²⁸ *Id.* art. 4, ¶ 1.

²⁹ *Id.* ¶ 2. The Siracusa Principles were developed to help signatory states determine when derogable rights could be derogated and what actions were permitted under emergency circumstances, with specific reference to a public health emergency. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, reprinted in 7 HUM. RTS. Q. 3, 9-10 (1985).

³⁰ ICCPR, *supra* note 2, art. 6.

³¹ *Id.* art. 8.

³² *Id.* art. 15.

personhood,³³ the protection of freedoms of thought and religion,³⁴ and, most centrally for this discussion, the absolute prohibition on the use of “torture [and] cruel, inhuman or degrading treatment or punishment.”³⁵

Given this legal history, it was especially disturbing to observe Attorney General designee Alberto Gonzales repeatedly being questioned about the administration’s policy on torture by a U.S. Senate panel at hearings on his nomination in January 2005.³⁶ The first question asked by Chairman Arlen Specter was, “[d]o you approve of torture?”³⁷ Gonzales replied, “[a]bsolutely not, Senator.”³⁸ Two weeks later, Secretary of State designee Condoleezza Rice pointedly refused to characterize forced nudity and simulated drowning as torture techniques, instead insisting that “the determination of whether interrogation techniques are consistent with our international obligations and American law are made by the Justice Department.”³⁹

Her comment mirrored an earlier one by Donald Rumsfeld, and she may have taken her lead from him. Bob Woodward reports on a White House meeting regarding the establishment of military tribunals at Guantanamo, at which the President brushed off Attorney General Ashcroft and interrupted then National Security Advisor Rice to ask Rumsfeld, “Don, what do you think about this?”⁴⁰ Rumsfeld replied, “[t]hey [detainees] are bad guys” who need to be kept “off the battlefield.”⁴¹ Bush, Woodward writes, agreed, but asked how. “I’m not a lawyer,” Rumsfeld replied.⁴² Not only did Rice and Rumsfeld have no legal training but, of course, neither did the President or the Vice President. The Rumsfeld-Rice “I’m not a lawyer” excuse for not knowing the law enhanced the value of the legal advice they were given (and, I

³³ *Id.* art. 16.

³⁴ *Id.* art. 18.

³⁵ *Id.* art. 7.

³⁶ See, e.g., *Confirmation Hearing on the Nomination of Alberto R. Gonzales To Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 54 (2005) (question of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (“[D]o you condemn . . . the interrogators’ techniques at Abu Ghraib shown on the widely publicized photographs?”); *id.* at 57 (question of Sen. Patrick Leahy) (“Do you agree today that for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death?”); *id.* at 62 (question of Sen. Orrin Hatch) (“Am I correct in my understanding that at no time did the President authorize the use of torture against detainees . . . ?”).

³⁷ *Id.* at 54.

³⁸ *Id.*

³⁹ Steven R. Weisman & Joel Brinkley, *Rice Sees Iraq Training Progress but Offers No Schedule for Exit: Senate Democrats Confront Nominee at Hearing*, N.Y. TIMES, Jan. 19, 2005, at A1.

⁴⁰ WOODWARD, *supra* note 5, at 276.

⁴¹ *Id.*

⁴² *Id.*

think, increased the obligation of administration lawyers giving the advice to faithfully and fairly interpret the law). Rumsfeld certainly understood this and continually took steps to get his generals to rely on his civilian lawyers in the Pentagon rather than on the JAG Corps who, among other things, consistently opposed marginalizing the Geneva Conventions and argued instead for following the Army Field Manual,⁴³ which in turn follows Geneva.⁴⁴

If asked for an opinion, any knowledgeable lawyer would have been obliged to tell the President that torture is absolutely prohibited by U.S. law. This is not only because of Nuremberg and the ICCPR, but also because the U.S. ratified a specific treaty, the International Covenant Against Torture (CAT), and subsequently enacted a U.S. criminal law against torture. "Torture" is defined in the CAT as

⁴³ See, e.g., Mayer, *supra* note 11, at 52 ("Rear Admiral Donald Guter, who was the Navy's chief JAG until June, 2002, said that he and the other JAGs, who were experts in the laws of war, tried unsuccessfully to amend parts of the military-commission plan when they learned of it, days before the order was formally signed by the President. 'But we were marginalized,' he said. 'We were warning them that we had this long tradition of military justice, and we didn't want to tarnish it. The treatment of detainees was a huge issue. They didn't want to hear it.'"). The marginalization of the JAG Corps was planned and vigorously pursued. Even when Congress acted to protect the authority of the JAG Corps in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 574, 118 Stat. 1811, 1921-22 (2004), President Bush wrote the following in his signing statement of October 29, 2004:

Section 574 of the Act . . . prohibit[s] Department of Defense personnel from interfering with the ability of a military department judge advocate general, and the staff judge advocate to the Commandant of the Marine Corps, to give independent legal advice to the head of a military department or chief of a military service or with the ability of judge advocates assigned to military units to give independent legal advice to unit commanders. *The executive branch shall construe section 574 in a manner consistent with:* (1) the President's constitutional authorities to take care that the laws be faithfully executed, to supervise the unitary executive branch, and as Commander in Chief; (2) the statutory grant to the Secretary of Defense of authority, direction, and control over the Department of Defense . . . (3) *the exercise of statutory authority by the Attorney General . . . and the general counsel of the Department of Defense as its chief legal officer . . . to render legal opinions that bind all civilian and military attorneys within the Department of Defense;* and (4) the exercise of authority under the statutes . . . by which the heads of the military departments may prescribe the functions of their respective general counsels.

Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 40 WEEKLY COMP. PRES. DOC. 2673 (Oct. 28, 2004) (emphasis added). Putting the military lawyers in the Pentagon under the civilian lawyers was something then Secretary of Defense Dick Cheney unsuccessfully asked Congress to do in 1991, during the first Gulf War. Charlie Savage, *Hail to the Chief: Dick Cheney's Mission To Expand – or "Restore" – the Powers of the Presidency*, BOSTON GLOBE, Nov. 26, 2006, at C1.

⁴⁴ DEP'T OF THE ARMY, FIELD MANUAL NO. 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, at vii (2006) ("The principles and techniques of [human intelligence] collection are to be used within the constraints established by US law including . . . Common Article III . . .").

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.⁴⁵

Torture is prohibited in the United States by the Fifth,⁴⁶ Eighth,⁴⁷ and Fourteenth Amendments.⁴⁸ Torture is also a crime under state criminal statutes prohibiting assault and battery.⁴⁹ The federal statute that followed ratification of the CAT makes it a crime for any person “outside the United States” (including, of course, Guantanamo and Abu Ghraib) to “commit[] or attempt[] to commit torture,”⁵⁰ defined for this purpose as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.”⁵¹ It is primarily this federal statute that has been the subject of conflicting interpretations from the U.S. Department of Justice. In the wake of the September 11 attacks, Justice Department lawyers argued that the President as commander in chief had the authority to order torture of prisoners and that, contrary to the Nuremberg Principles, obeying such an order would be a valid defense to a war crime or crime against humanity charge.⁵²

⁴⁵ CAT, *supra* note 3, art. 1; *see also* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (adding a note to 28 U.S.C. § 1350 to add a definition of torture similar to that contained in the CAT); Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 HUM. RTS. Q. 809, 811-12 (2006) (summarizing the definition of torture under U.S. criminal law).

⁴⁶ U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself . . .”); *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right To Remain Silent*, 94 MICH. L. REV. 2625, 2651 (1996) (“The Fifth Amendment privilege prohibited (1) incriminating interrogation under oath, (2) torture, and (3) probably other forms of coercive interrogation such as threats of future punishment and promises of leniency.” (footnote omitted)).

⁴⁷ U.S. CONST. amend. VIII (prohibiting “cruel and unusual punishments”).

⁴⁸ *Id.* amend. XIV, § 1 (prohibiting the taking “of life, liberty, or property, without due process of law”); *see also* *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding that torturing defendants to obtain confessions violated their due process rights).

⁴⁹ Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 726 (2006) (“[I]n most if not all jurisdictions, torture constitutes the intentional torts of assault and battery when committed by private persons.”).

⁵⁰ 18 U.S.C. § 2340A (2000).

⁵¹ *Id.* § 2340.

⁵² *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *in* THE TORTURE PAPERS, *supra* note 10, at 172, 213.

C. *Torture and the Justice Department*

The August 1, 2002, memorandum from the Justice Department to Alberto Gonzales also concluded that to constitute torture under the statute, the intensity of the pain inflicted “must rise to . . . the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”⁵³ This memorandum, in which Justice Department lawyers acted more like mafia attorneys by advising their clients (in this case government officials) about how they might avoid prosecution under the anti-torture statute rather than how to follow the law, has been widely and rightly criticized – and the U.S. Department of Justice withdrew it shortly after it became public in June 2004.

One week before Alberto Gonzales’ confirmation hearing, the Justice Department issued a replacement memorandum setting forth its new interpretation of the anti-torture law, which is much more consistent with both the language of the law and U.S. policy.⁵⁴ This memo begins by expressing the overriding theme of U.S. law on torture: “Torture is abhorrent both to American law and values and to international norms.”⁵⁵ The memo continues, “This universal repudiation of torture is reflected in our criminal law, . . . international agreements, . . . customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.”⁵⁶ Unfortunately, the memorandum also raises significant problems of hypocrisy and secrecy, stating as it does in footnote eight that prior opinions – still secret – approving various interrogation techniques for detainees were not affected by the new memorandum.⁵⁷ One such memo was prepared for the CIA and is reported to authorize the “use of some 20 interrogation practices,” including waterboarding, a torture technique in which people are made to believe they might drown.⁵⁸

⁵³ *Id.* at 176.

⁵⁴ See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), in *THE TORTURE DEBATE IN AMERICA*, *supra* note 12, at 361, 362 [hereinafter Levin Memo].

⁵⁵ *Id.* at 361.

⁵⁶ *Id.* (footnotes omitted).

⁵⁷ *Id.* at 361 n.8.

⁵⁸ Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1. Elaine Scarry persuasively argues that to give torture techniques names (like “waterboarding”) “is to make language and civilization participate in their own destruction.” SCARRY, *supra* note 17, at 43. She continues:

The nomenclature for torture is typically drawn from three spheres of civilization. First . . . the prolonged, acute distress of the body is in its contortions claimed to be mimetic of a particular invention or technological feat: the person’s pain will be called “the telephone” in Brazil, “the plane ride” in Vietnam, “the motorola” in Greece, and “the San Juanica Bridge” in the Philippines. The second sphere is the realm of cultural

In contrast to its own continued equivocation, the replacement Justice Department memorandum quotes statements of the President, who said on June 30, 2003, that “[t]orture anywhere is an affront to human dignity everywhere,”⁵⁹ and said on July 5, 2004, “America stands against and will not tolerate torture. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.”⁶⁰ Most notably, in an NBC Today interview regarding interrogation and torture with Matt Lauer on the fifth anniversary of 9/11, the President said, “And whatever we have done is legal. That’s what I’m saying. It’s in the law. We had lawyers look at it and say, ‘Mr. President, this is lawful.’ That’s all I can tell you.”⁶¹

Unfortunately, few people seem to believe the President, perhaps because he has never been clear on what he means by torture, and also seems to believe somehow that it is only torture that is prohibited, not cruel treatment used in interrogations. The President has been forced to repeatedly declare that the United States “does not torture,” including just before the November 2006 elections when he repudiated a statement by the Vice President that seemed to approve of the use of waterboarding.⁶² Aside from his fascination with waterboarding, the ticking time bomb hypothetical has been Dick Cheney’s favorite rhetorical device to justify torture.⁶³ The ticking time bomb

events, ceremonies, and games: there is “the dance” in Argentina, “the birthday party” in the Philippines . . . and “tea party with toast” in Greece. . . . The third realm is nature or nature civilized [T]ypical are “the little hare” of Greece, “the parrot’s perch” of Brazil and Uruguay, and “the dragon’s chair” of Brazil. In all these cases the designation of an intensely painful form of bodily contortion with a word usually reserved for an instance of civilization produces a circle of negation: there is no human being in excruciating pain

Id. at 44 (footnotes omitted).

⁵⁹ Levin Memo, *supra* note 54, at 361 n.4.

⁶⁰ *Id.* at 362 n.7.

⁶¹ *Today* (NBC television broadcast Sept. 11, 2006).

⁶² Neil A. Lewis, *Furor Over Cheney Remark on Tactics for Terror Suspects*, N.Y. TIMES, Oct. 28, 2006, at A8 (detailing an interview in which Vice President Cheney responded to the question “[w]ould you agree that a dunk in water is a no-brainer if it can save lives,” by saying “it’s a no-brainer for me,” and quoting the President’s subsequent response to reporters’ questions about the exchange). Regarding the same exchange, Hendrik Hertzberg commented as follows:

The “dunk in water” they were talking about is waterboarding. It has been used by the Gestapo, the North Koreans, and the Khmer Rouge. After the Second World War, a Japanese soldier was sentenced to twenty-five years’ hard labor for using it on American prisoners. It is torture, and torture is not a no-brainer. It is a no-souler. The no-brainer is the choice on Election Day.

Hendrik Hertzberg, Comment, *Hearts and Brains*, NEW YORKER, Nov. 6, 2006, at 45, 48.

⁶³ The ticking time bomb hypothetical asks whether torture is justified in the extreme situation where a suspect is believed to possess information concerning an imminent threat to innocent civilians, such as the location of a ticking time bomb. JOHN W. DEAN, CONSERVATIVES WITHOUT CONSCIENCE 164-65 (2006).

hypothetical has been well dealt with as an absurdity in the real world by others and in any event has no relationship at all to what has occurred at either Abu Ghraib or Guantanamo.⁶⁴

⁶⁴ For the best analysis to date of the ticking bomb hypothetical, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005). Luban raises the following five questions concerning the ticking time bomb hypothetical, demonstrating why the hypothetical is a faulty basis for public policy: (1) How sure do you have to be that you have captured a man who actually knows about the bomb plot?; (2) Do you make your decision by the numbers, i.e., does a one percent chance of saving one thousand lives mean you can torture ten people?; (3) If you think one person of fifty at Guantanamo knows where Osama bin Laden is hiding, can you torture them all to find out?; (4) If there was no certainty that capturing Osama would save any lives, does the war on terror itself justify torture?; and (5) If you are willing to torture forty-nine innocent persons to identify one guilty suspect, why not torture the suspect's loved ones, especially his spouse and children, in front of him? They are, after all, no more innocent than the forty-nine. *Id.* at 1442-44. Luban continues,

[t]he point of the examples is that in a world of uncertainty and imperfect knowledge, the ticking-bomb scenario should not form the point of reference. . . . Once you accept that only the numbers count, then anything, no matter how gruesome, becomes possible. . . .

. . . As [Bernard] Williams says, "there are certain situations so monstrous that the idea that the processes of moral rationality could yield an answer in them is insane," and "to spend time thinking what one would decide if one were in such a situation is also insane, if not merely frivolous."

Id. at 1444-45. Although I find Luban completely persuasive, I recognize that others do not. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 131-63 (2002) (arguing that we should set up an official government system to sanction torture, complete with the requirement to get a "torture warrant" signed by a high responsible government official – most likely the President). Aside from being a complete abrogation of our treaty obligations and turning torture from an absolutely prohibited criminal activity into an officially sanctioned one, Dershowitz unravels his own argument by attempting to place strict limits on the torturer – limits that would be (and should be) impossible to sustain in a real life situation. Specifically, he would confine the torturer to using a "sterilized needle" placed under the fingernails. *Id.* at 144, 154. The sterilized needles seemed designed to make sure no lasting physical harm is induced, but of course raise the primary issue of this Article: is it true that as atavistic as we may be, Americans need the active involvement of both lawyers and physicians to approve of torture? Dershowitz certainly seems to believe this, and his adjective "sterilized" harkens back to an old saying of the Nazis, who used physicians on submarines to administer the death penalty by lethal injection: "[t]he needle belongs in the hand of the doctor." Robert N. Proctor, *Nazi Medical Ethics: Ordinary Doctors?*, in 2 *MILITARY MEDICAL ETHICS* 403, 414 (Thomas E. Beam & Linette R. Sparacino eds., 2003). For additional scholarship criticizing Dershowitz's reasoning and the ticking time bomb hypothetical, see generally Vittorio Bufacchi & Jean Maria Arrigo, *Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument*, 23 *J. APPLIED PHIL.* 355 (2006), Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in *TORTURE: A COLLECTION* 281 (Sanford Levinson ed., 2004), and Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 *CASE W. RES. J. INT'L L.* 231 (2006).

D. *Torture and the Geneva Conventions*

Almost overshadowing the U.S. government's public views on U.S. torture law has been its view on international law, specifically the Geneva Conventions. In a memorandum to President Bush, Alberto Gonzales asserted that the President has the constitutional authority to determine whether the Geneva Conventions apply to al Qaeda and Taliban detainees, and that reasonable legal grounds exist to support President Bush's conclusion that the Geneva Conventions do not apply.⁶⁵ The Bush administration seems to have assumed that if neither the U.S. Constitution nor international law applied in Guantanamo, the administration could write its own rules of conduct for the prison, and it did. Donald Rumsfeld, for example, specifically approved coercive interrogation methods, some of which were inconsistent with the Geneva Conventions, for use in the interrogations there.⁶⁶ He also specifically involved physicians by requiring that prisoners receive medical clearance before these techniques can be applied to them. In the words of his directive, the new techniques can be used only after, among other things, "the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination)."⁶⁷

These torture techniques made their way to Abu Ghraib when the commander of Guantanamo, Major General Geoffrey Miller, was transferred to Iraq.⁶⁸ The commanding general at Abu Ghraib, Janis Karpinski, has described her first meeting with General Miller, who had been sent to "Gitmo-ize" Abu Ghraib. She noted that she was skeptical of his mission because "[h]is prisoners [at Guantanamo], accused terrorists of many nationalities, were not regarded as prisoners of war, and thus were not subject to the restrictions of the Geneva Conventions. Ours were."⁶⁹ When a military

⁶⁵ Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), in *THE TORTURE PAPERS*, *supra* note 10, at 118, 118. This memorandum can be contrasted usefully with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), in which the Second Circuit Court of Appeals ruled that U.S. courts had jurisdiction under the Federal Alien Tort Statute (ATS) to hear civil cases brought by non-citizen victims of torture against their torturers. In his opinion upholding jurisdiction, Judge Kaufman summarized a universally accepted principle of international human rights law: "[T]he torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind." *Id.* at 890.

⁶⁶ See Memorandum from Donald Rumsfeld, Sec'y of Def., to Commander, U.S. S. Command, Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), in *THE TORTURE PAPERS*, *supra* note 10, at 360, 360-63.

⁶⁷ *Id.* at 364.

⁶⁸ See SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 30-32 (2004); THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 199, 238-40, 290-97 (2006).

⁶⁹ JANIS KARPINSKI WITH STEVEN STRASSER, ONE WOMAN'S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY 197 (2005).

intelligence officer told Miller, “[w]e’re treating prisoners the right way,” she recounts:

That set Miller off. “Look, the first thing you have to do is treat these prisoners like dogs,” he said. “If they ever get the idea that they’re anything more than dogs, you’ve lost control of your interrogation.”⁷⁰

Although Miller later denied he said this, the actions of the military police under Karpinski’s command, in particular putting a dog collar and leash on a prisoner and making another crawl like a dog, support Karpinski’s version.

Had the Geneva Conventions been followed, the torture and abuse of prisoners at Abu Ghraib would not have occurred. Even if the administration sincerely believed that there was some emergency exception to the prohibition on torture and cruel and degrading treatment, a pure pragmatist would have known that public knowledge of treatment of prisoners like that photographed at Abu Ghraib would do more to injure America’s cause in the war on terrorism than any terrorist organization could do itself.

Physicians also had the opportunity to stop what the lawyers had promoted by acting as human rights monitors. Not only do the Conventions prohibit torture and abusive and humiliating treatment of prisoners, but they also specifically protect physicians who follow medical ethics by reporting and refusing to participate in torture and abuse of prisoners.⁷¹ The Department of Defense’s own independent panel highlighted professional ethics as the core consideration in torture and abuse prevention, recommending that “[a]ll personnel who may be engaged in detention operations, from point of capture to final disposition, should participate in a professional ethics program that would equip them with a sharp moral compass for guidance in situations often riven with conflicting moral obligations.”⁷² As to physicians specifically, the panel observed that “training should include the obligation to report any detainee abuse.”⁷³

⁷⁰ *Id.* at 197-98.

⁷¹ GEORGE J. ANNAS, AMERICAN BIOETHICS: CROSSING HUMAN RIGHTS AND HEALTH LAW BOUNDARIES 8-10 (2005) (discussing the Geneva Conventions generally and citing Protocol 1 to the Geneva Conventions of 1977, article 16 of which provides that “[u]nder no circumstances shall any person be punished for carrying out *medical activities compatible with medical ethics*, regardless of the person benefiting therefrom”).

⁷² INDEP. PANEL TO REVIEW DEP’T OF DEF. DETENTION OPERATIONS, THE SCHLESINGER REPORT (2004), *reprinted in* THE TORTURE PAPERS, *supra* note 10, at 908, 953.

⁷³ *Id.* General Antonio Taguba, who wrote the Army’s report on Abu Ghraib concluding that “[n]umerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees,” was seen as disloyal for these conclusions and ordered to retire. In an interview in 2007, after he retired, General Taguba said: “I know that my peers in the Army will be mad at me for speaking out, but the fact is that we violated the laws of land warfare in Abu Ghraib. We violated the tenets of the Geneva Convention. We violated our own principles and we violated the core of our military values. The stress of combat is not an excuse, and I believe, even today, that those civilian and military leaders responsible should

E. Torture Prevention

The U.S. Supreme Court ultimately decided that prisoners at Guantanamo could challenge their imprisonment in U.S. courts, as well as bring civil claims for injury and abuse under the Alien Tort Statute.⁷⁴ The Court thus rejected the Bush administration's position, as stated in oral argument before the Ninth Circuit, that even if the government was engaged in murder and torture at Guantanamo, U.S. courts could not interfere.⁷⁵ In another case decided the same day, the U.S. Supreme Court ruled that a U.S. citizen captured on the battlefield and originally held at Guantanamo had a right to a fair hearing under the U.S. Constitution to contest his status as an "enemy combatant."⁷⁶ In dicta, the U.S. Supreme Court cited provisions of the Geneva Convention III (relative to prisoners of war) as authoritative on the "law of war."⁷⁷ In all of

be held accountable." Seymour M. Hersh, *The General's Report*, NEW YORKER, June 25, 2007, at 58, 69.

⁷⁴ *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004). In the same year, the U.S. Supreme Court answered the question of the reach of the ATS for the entire country in the case of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). American Drug Enforcement Administration (DEA) officials believed that when a DEA agent, Enrique Camarena-Salazar, was captured in Mexico, tortured over a two-day period, and then murdered, Mexican physician Humberto Alvarez-Machain had been present and used his medical skills "to extend the interrogation and torture." *Id.* at 697. Demonstrating how strongly the U.S. government objected to physicians' participation in torture, the DEA took the extraordinary step of "hir[ing] Mexican nationals to seize Alvarez and bring him to the United States for trial." *Id.* at 698. The kidnapping succeeded, but at trial Alvarez was found not guilty. *Id.* After returning to Mexico, Alvarez himself brought an action against the United States under the ATS, alleging false arrest and arbitrary detention. *Id.* at 698. Alvarez won at trial, and the Ninth Circuit Court of Appeals affirmed. *Id.* at 699.

In support of his position that his arbitrary detention was a violation of international law, Alvarez cited the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. *Id.* at 734. The Court found that the Declaration did not have the force of law, and that "the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id.* at 734-35. The case thus stands for the proposition that a brief illegal detention is insufficient grounds for a claim for money damages in U.S. courts as a violation of international law. *See id.* at 738.

The decision is more important, however, for the Court's conclusion that when acts are universally condemned by international law, such as state-sanctioned piracy, torture, and murder, they can be the basis for a lawsuit under the ATS. *See id.* at 732-33. In the case of torture, the Supreme Court would likely find a violation of international law both because it is universally condemned in international law, and because the U.S. Congress has ratified the CAT and also adopted a law authorizing individual lawsuits for torture victims. Thus, under the ATS, the victims of torture at Guantanamo and Abu Ghraib, for example, may bring a claim against their alleged torturers in U.S. court, and many undoubtedly will.

⁷⁵ *Gherebi v. Bush*, 374 F.3d 727, 738 (9th Cir. 2004).

⁷⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

⁷⁷ *Id.* at 520.

these cases, the judicial branch of government has been much more insistent than the executive in condemning torture and upholding both U.S. and international law.

As Telford Taylor argued at Nuremberg, prevention of crimes against humanity, like torture, must be our primary goal. Torture remains widely practiced around the world, even though widely condemned. Amnesty International, for example, estimates that 150 countries may condone torture.⁷⁸ Torture is wrong under all circumstances because it is cruel and degrading and an extreme violation of human rights under international law. Jean-Paul Sartre's description of torture almost fifty years ago during the French-Algerian War echoes in post-9/11 America:

Torture is senseless violence, born in fear. The purpose of it is to force from one tongue, amid its screams and its vomiting up of blood, the secret of *everything*. Senseless violence: whether the victim talks or whether he dies under his agony, the secret that he cannot tell is always somewhere else and out of reach. It is the executioner who becomes Sisyphus. If he puts the question at all, he will have to continue for ever.⁷⁹

Abu Ghraib and the torture debate gained worldwide attention primarily because of the photographs of cruel and inhuman treatment of prisoners by American soldiers.⁸⁰ This documentation made denial impossible. In Guantanamo, the only emblematic photograph was taken on the first day that prisoners arrived there. Unable to see because of goggles and dressed in orange jumpsuits, they were all made to kneel before their American guards.⁸¹ Since that day, however, information from Guantanamo has been carefully guarded. The names of only a few physicians serving there are known, only a handful of incomplete medical records have become available, and no prisoner has ever been given a physical or psychiatric examination by an independent physician. President Bush said in mid-2006 that he would like to see

⁷⁸ AMNESTY INT'L, COMBATING TORTURE: A MANUAL FOR ACTION 2 (2003), *available at* http://www.amnesty.org/resources/pdf/combating_torture/combating_torture.pdf.

⁷⁹ Jean-Paul Sartre, *Introduction to HENRI ALLEG, THE QUESTION* 13, 29-30 (American ed., George Braziller, Inc. 1958) (1958).

⁸⁰ The graphic Abu Ghraib photos, most taken by Charles Graner and turned over to the Army's Criminal Investigation Division by Sergeant Joseph Darby, are available at The Memory Hole, Images from Abu Ghraib, http://www.thememoryhole.org/war/iraqis_tortured (last visited Apr. 1, 2007). See HERSH, *supra* note 68, at 25 (describing Darby's reporting of detainee abuse to his superiors). Fernando Botero's paintings are available in book form, which includes an essay on them by David Ebony. See BOTERO, ABU GHRAIB (2006); see also Arthur C. Danto, *The Body in Pain*, NATION, Nov. 27, 2006, at 23; Juan Forero, 'Great Crime' at Abu Ghraib Enrages and Inspires an Artist: Botero Depicts Torture of Prisoners by Americans, N.Y. TIMES, May 8, 2005, § 1, at 10.

⁸¹ Some photographs from Guantanamo are available at BBC News, In Pictures: Camp X-Ray Prisoners (Jan. 20, 2002), <http://news.bbc.co.uk/2/hi/americas/1771816.stm>.

Guantanamo “over with,”⁸² but shortly thereafter transferred fourteen prisoners who had been held for harsh questioning, and likely torture, at CIA-run black sites to Guantanamo for trial.⁸³ The future of Guantanamo remains uncertain, as does the future of the prisoners there.⁸⁴ The only form of protest they have been able to mount has been through hunger strikes. Although not all the facts are known, it seems reasonable to conclude that the U.S. military, including military physicians, has reacted in a cruel and inhuman manner against prisoners on hunger strikes there.

II. HUNGER STRIKES AT GUANTANAMO

A. *Punishing Hunger Strikes*

On September 11, 2005, 131 prisoners at Guantanamo were on hunger strikes. At the end of 2005, that number had dropped to eighty-four.⁸⁵ Then a new technique was introduced into the prison camp to break the hunger strike: use of an emergency restraint chair. The chair’s inventor, a former sheriff who had one of his jailers injured by a prisoner, describes it as a “padded cell ‘on [w]heels.’”⁸⁶ His company, E.R.C. Inc., has shipped twenty-five such transportation chairs to Guantanamo.⁸⁷ The prisoner can be strapped into one of them in six-point restraints, including not just hands and feet but also head and torso, and safely transported to a medical care facility. The chair was

⁸² President’s News Conference with European Leaders in Vienna, Austria, 42 WEEKLY COMP. PRES. DOC. 1189, 1192 (June 21, 2006) (“[O]bviously, they brought up the concern about Guantanamo. And I understand their concerns. But let me explain my position. First, I’d like to end Guantanamo; I’d like it to be over with. . . . So I understand the concerns of the leaders. They expressed the concerns of the European leaders and the European people about what Guantanamo says. I also shared with them my deep desire to end this program, but also I assured them that we will – I’m not going to let people out on the street that will do you harm.”).

⁸³ Sheryl Gay Stolberg, *President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES, Sept. 7, 2006, at A1.

⁸⁴ Shortly after he was named the new Secretary of Defense, Robert Gates began to repeatedly argue that Guantanamo should be shut down as soon as possible. Secretary of State Rice agrees with him, but reportedly Attorney General Gonzales and Vice President Cheney insisted that Guantanamo remain open, and President Bush agreed with them. Thom Shanker & David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. TIMES, Mar. 23, 2007, at A1. It may take legislation to close Guantanamo. Thom Shanker & David Johnston, *Legislation Could Be Path to Closing Guantanamo*, N.Y. TIMES, July 3, 2007, at A10.

⁸⁵ Tim Golden, *Tough U.S. Steps in Hunger Strike at Camp in Cuba*, N.Y. TIMES, Feb. 9, 2006, at A1.

⁸⁶ E.R.C. Inc., Emergency Restraint Chair, <http://www.restraintchair.com> (last visited Apr. 1, 2007).

⁸⁷ Golden, *supra* note 85.

designed for transportation, not for treatment or punishment.⁸⁸ Nonetheless, at Guantanamo, these chairs have been systematically used since early 2006 to immobilize prisoners on hunger strikes to force-feed them as a strategy to break the strike. And to a large extent it has succeeded.⁸⁹

The medical records of the Guantanamo prisoners who have been force-fed in the restraint chairs, some of which have been introduced into evidence in pending lawsuits to enjoin further use of the chairs,⁹⁰ contain what appears to be a pre-printed "medical officer note" that indicates that medical practice is being used not to treat a physical condition, but to punish undesirable behavior. Twenty-year-old prisoner Yusuf al-Shehri's medical records, for example, contain the following entry twice a day for eight consecutive days from January 18 to January 26, 2006, after which the records indicate he ended his hunger strike and became "compliant":

Despite being advised that hunger striking is detrimental to his health, the detainee refuses to eat. Restraints were ordered for medical necessity to facilitate feeding the detainee. There is no evidence that medications or a medical process is causing this detainee's refusal to eat. Detainee does not have any medical condition/disability that would place him at greater risk during feeding using medical restraints. . . . Detainee was told that he will remain in restraints until feed and post feed observation time (60-120 minutes) is completed. Detainee understands that if he eats, that involuntary feeding in medical restraints will no longer be required. GITMO Dr _____.⁹¹

⁸⁸ See E.R.C. Inc., *supra* note 86.

⁸⁹ See Tim Golden, *Guantanamo Detainees Stage Hunger Strike Despite Force-Feeding Policy*, N.Y. TIMES, Apr. 9, 2007, at A12 (explaining that the use of restraint chairs aided the military in breaking "a long-running [hunger] strike" in early 2006).

⁹⁰ See, e.g., *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 23 (D.D.C. 2005) (granting counsel access to prisoners' medical records related to force-feeding).

⁹¹ Medical Records for Yousif Mohammad Mubarak Al-Shehri (Jan. 2006) (on file with author). Al-Shehri's name was first made public by *Time* in June 2006, immediately after three suicides at Guantanamo. See Adam Zagorin & Richard Corliss, *Death Comes to Guantánamo*, TIME, June 19, 2006, at 38, 39 ("According to medical records obtained by TIME, a 20-year-old named Yusuf al-Shehri, jailed since he was 16, was regularly strapped into a specially designed feeding chair [sic] that immobilizes the body at the legs, arms, shoulders and head. Then a plastic tube, sometimes as much as 50% bigger than the type commonly used for feeding incapacitated patients, was inserted through his nose and down his throat – a procedure that can trigger nausea, bleeding and diarrhea."). Medical records confirm his force-feeding, but his case is hardly the worst. Up to five prisoners have endured this "treatment" for months. In an affidavit for one such prisoner, his lawyer, Julia Tarver Mason, says he told her when she was finally allowed to see him on September 8, 2006, that he had been strapped into the emergency restraint chair and force-fed twice a day for more than seven months. Declaration by Julia Tarver Mason, Esq. at 1, *Al-Joudi v. Bush*, No. CIV.A.05-0301(GK) (D.D.C. Sept. 20, 2006). In the chair, he was "incapable of movement, as nurses and corpsmen rammed tubes up his nose, pumped five to ten cans of

The name of the physician has been redacted. Records of another prisoner at Guantanamo who was being force-fed indicate that his six-point restraints “may be removed early if detainee meets behavioral standards” and that during his “tube feeding . . . detainee will be observed continuously and encouraged to express his frustration. He will be reminded of how his behavior must change if he is to be allowed out of restraints.”⁹² The medical record continues with the following checklist:

Detainee was told that he will remain in restraints until he:

Demonstrates control of his behavior with no attempts to harm self, staff or others

ceases profanity and threatening language

listens to and follows directions

makes no attempts to loosen or pull at restraints (except to discuss with medical staff if he was uncomfortable.)

makes no attempt to resist placement or remove medical devices such as IV/NGT

GITMO Doc [signature redacted].⁹³

B. *Medical Ethics and Competent Hunger Strikers*

The use of force-feeding by physicians of competent prisoners on hunger strikes is widely condemned as both illegal and unethical.⁹⁴ And when similar methods were used by the Soviets during the cold war, Americans readily condemned them as cruel and inhuman.⁹⁵ But some controversies persist, most

liquids into his fragile and emaciated body, and then left him there to urinate and defecate on himself for hours at a time, ignoring his pleas for a bathroom.” *Id.* at 4.

⁹² Medical Records of Unidentified Patient (Jan. 2, 2006) (on file with author).

⁹³ *Id.*

⁹⁴ See, e.g., U.N. ECOSOC, Comm’n on Human Rights, *Economic, Social and Cultural Rights: Civil and Political Rights: Situation of Detainees at Guantánamo Bay*, ¶¶ 79-82, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (prepared by Leila Zerrougui et al.); Luke Mitchell, *God Mode*, HARPER’S MAG., Aug. 2006, at 9, 9-10; David J. Nicholl et al., Correspondence, *Forcefeeding and Restraint of Guantánamo Bay Hunger Strikers*, 367 LANCET 811, 811 (2006); Nancy Sherman, *Holding Doctors Responsible at Guantánamo*, 16 KENNEDY INST. ETHICS J. 199, 200-02 (2006).

⁹⁵ Even after September 11, George W. Bush’s President’s Council on Bioethics highlighted political prisoner Vladimir Bukovsky’s description of his force-feeding in the USSR in 1971, under the title “Account of Torture.” PRESIDENT’S COUNCIL ON BIOETHICS, BEING HUMAN 218-19 (2003). More recently, in 2007, it was revealed that both the military and the CIA have actually been using Soviet torture techniques to train their own personnel. See, e.g., Scott Shane & Mark Mazzetti, *Advisers Fault Harsh Methods in Interrogation*, N.Y. TIMES, May 30, 2007, at A1; Scott Shane, *Soviet-Style ‘Torture’ Becomes*

related to assessment of the prisoner's competence and motivation, as well as the likely impact of a successful hunger strike on prison security. How do medical ethics counsel physicians employed by the state, whether prison or military physicians, about the appropriateness of treating competent hunger strikers against their will? Guantanamo provides a case study that can help answer this question.

Various types of hunger strikes have been occurring at Guantanamo almost since it opened in early 2002.⁹⁶ As many as two hundred prisoners have been on hunger strikes at once,⁹⁷ and there were probably about one hundred on hunger strikes in November 2005, when Secretary of Defense Rumsfeld was asked, "Do you approve of the forced feeding of detainees [at Guantanamo] who are on hunger strikes?"⁹⁸ He replied,

I'm not a doctor and I'm not the kind of a person who would be in a position to approve or disapprove. It seems to me, looking at it from this distance, is that the responsible people are the combatant commanders and the Army as the executive agent for detainees. They make – have expert medical people who make decisions of that type. And they've made a decision that they think it's appropriate for them to provide nourishment to people who, for whatever reason, at various points in their detention decide they want to not provide normal nourishment to themselves. There are a number of things that one can glean from the way it's being done. I don't think there's a serious risk of people – well, I shouldn't say that, I'm not in a position to know that. But there are a number of people who go on a diet where they don't eat for a period and then go off of it at some point, and then they rotate and other people do that. So it's clearly a technique to try to get the attention of you folks [the press], and they're successful.⁹⁹

In short, the decision whether to force-feed a prisoner at Guantanamo seems to be a military decision to be made by the base commander; the decision about

'Interrogation' in the War on Terror, N.Y. TIMES, June 3, 2007, § 4, at 3. One of the articles relied on, Lawrence E. Hinkle Jr. & Harold G. Wolff, *Communist Interrogation and Indoctrination of "Enemies of the States,"* 76 ARCHIVES NEUROLOGY & PSYCHIATRY 115 (1956), is in the medical literature. See generally INTELLIGENCE SCI. BD., NAT'L DEF. INTELLIGENCE COLL., EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART (2006), available at <http://www.fas.org/irp/dni/educing.pdf>.

⁹⁶ See generally GITANJALI GUTIERREZ, CTR. FOR CONSTITUTIONAL RIGHTS, THE GUANTANAMO PRISONER HUNGER STRIKES & PROTESTS: FEBRUARY 2002-AUGUST 2005 (2005), available at http://www.ccr-ny.org/v2/legal/september_11th/docs/Gitmo_Hunger_Strike_Report_Sept_2005.pdf.

⁹⁷ *Id.* at 9.

⁹⁸ Donald H. Rumsfeld, Sec'y of Def. & Gen. Peter Pace, Chairman, Joint Chiefs of Staff, News Briefing (Nov. 1, 2005), available at <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=1440>.

⁹⁹ *Id.*

the technique used to actually do the force-feeding is a medical one to be made by military physicians.

The use of physicians to aggressively break a prison hunger strike raises complex medical ethics and legal issues that have been the subject of international debate for decades. U.S. courts have occasionally been asked to rule on the legality of forced feeding of prisoners and have usually permitted it if done by a physician in a medically reasonable manner for the primary purpose of either preventing suicide or maintaining order in the prison.¹⁰⁰ In terms of American constitutional law, competent prisoners have a constitutional right to refuse treatment, but prison officials may overrule it when they have “legitimate penological interests,” which include preventing suicide by prisoners and maintaining order in the prison itself.¹⁰¹ I have written about hunger strikes a number of times over the past twenty-five years, once concluding in 1982 that “[w]e restrict the rights of prisoners in many ways. Force-feeding them rather than permitting them to starve themselves to

¹⁰⁰ See, e.g., *Thor v. Superior Court*, 855 P.2d 375, 390 (Cal. 1993) (holding that a competent prisoner has the right not to eat); *Singletary v. Costello*, 665 So. 2d 1099, 1109-10 (Fla. Dist. Ct. App. 1996) (holding that it is not acceptable to force-feed a prisoner who has no suicidal intent and whose hunger strike does not undermine prison security); *Zant v. Prevatte*, 286 S.E.2d 715, 717 (Ga. 1982) (holding that a competent prisoner may refuse tube feeding); *In re Caulk*, 480 A.2d 93, 97 (N.H. 1984) (holding that it is acceptable to force-feed a suicidal prisoner); *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 625-26 (App. Div. 1982) (holding that it is acceptable to force-feed a prisoner to prevent suicide and citing three trial court decisions in other states in accord with this holding); cf. *Comm’r of Corr. v. Myers*, 399 N.E.2d 452, 458 (Mass. 1979) (holding that a prisoner may not refuse kidney dialysis in an attempt to be transferred). Prison hunger strikes are dangerous for both the striking prisoner and jailers, but are often the only way, or the last resort, for a prisoner to protest the conditions of his confinement. See generally SHERMAN APT RUSSELL, *HUNGER: AN UNNATURAL HISTORY* (2005) (discussing cultural attitudes toward hunger). The best known force-feeding cases have to do with comatose patients and patients in persistent or permanent vegetative states, like Karen Ann Quinlan, Nancy Cruzan, and Terri Schiavo, but these have nothing to do with competent prisoners on a hunger strike except that they all affirm a common law and/or constitutional right of competent adults to refuse any medical treatment, including tube feeding, regardless of a likely lethal outcome. See generally *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005); *In re Quinlan*, 355 A.2d 651 (N.J. 1976). On the other hand, they are relevant to the possible use of living wills in the context of a hunger strike. For a discussion of tube feeding and U.S. law, see generally George J. Annas, “*I Want To Live*”: *Medicine Betrayed by Ideology in the Political Debate Over Terri Schiavo*, 35 STETSON L. REV. 49 (2005) (discussing the legal and ethical issues raised by the Terri Schiavo case), and NORMAN L. CANTOR, *MAKING MEDICAL DECISIONS FOR THE PROFOUNDLY MENTALLY DISABLED* (2005) (discussing ethical issues surrounding medical decision making for those incapable of giving consent).

¹⁰¹ *Washington v. Harper*, 494 U.S. 210, 223 (1990) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

death is probably one of the most benign.”¹⁰² This is also the position that the U.S. Defense Department has taken on the Guantanamo hunger strikes. As the most senior civilian physician in the Pentagon, William Winkenwerder, put it in response to questions about breaking the January 2006 Guantanamo hunger strike, “‘There is a moral question Do you allow a person to commit suicide? Or do you take steps to protect their health and preserve their life?’”¹⁰³

But both my 1982 position and Winkenwerder’s 2006 position seem overly simplistic and mechanistic in the context of Guantanamo, and I grossly underestimated the pain and medical complications force-feeding can impose on a competent prisoner. Physicians must answer three interrelated questions to determine their legal and ethical obligations to prison hunger strikers: Is the prisoner on a hunger strike? When is it ethical for a physician to force-feed a hunger striker? And what means can a physician use to force-feed a hunger striker?

Hernan Reyes of the International Committee of the Red Cross has written the most authoritative article on hunger strikes, which he also terms voluntary total fasting.¹⁰⁴ Fasting, voluntariness, and a stated purpose are all needed before a prisoner can be said to be on a hunger strike. Simply refusing to eat as a reaction to a specific situation, whether in frustration or anger, for example, does not qualify as a hunger strike. Thus the initial rounds of fasting at Guantanamo, done in early 2002 in response to specific actions of the guards toward individual prisoners, would not count. Nor do mentally incompetent prisoners who refuse to eat out of severe depression or other mental illness, and with no goal in mind other than their own death, qualify as legitimate hunger strikers.

The determination to fast until either political demands are met or death occurs may vary from person to person. This is especially true when fasting occurs in groups, since members of the group may be less free to break the fast, a fact that physicians must take into account when deciding whether or not the prisoner-patient is voluntarily continuing to refuse food.¹⁰⁵ The determination of the hunger striker will also suggest the likely medical consequences of continuing the hunger strike. Most hunger strikers, for example, have taken some water, salt, sugar, and vitamin B1 at least for a time before asserting an intention to fast to death.¹⁰⁶ These nutrients significantly

¹⁰² George J. Annas, *Prison Hunger Strikes: Why the Motive Matters*, 12 HASTINGS CENTER REP. 21, 22 (1982).

¹⁰³ Mitchell, *supra* note 94, at 9. Winkenwerder was replaced by Ward Casscells in May 2007.

¹⁰⁴ Hernan Reyes, *Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture*, Jan. 1, 1998, <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPZP>.

¹⁰⁵ *Id.*

¹⁰⁶ N.Y. Oguz & S.H. Miles, *The Physician and Prison Hunger Strikes: Reflecting on the Experience in Turkey*, 31 J. MED. ETHICS 169, 169 (2005); see also D.M.T. Fessler, *The*

decrease the chances of permanent disability should the strike end prior to death (which is never the desired end point of a true hunger striker).¹⁰⁷

The World Medical Association (WMA) in its Tokyo Declaration ruled out physician participation in prisoner force-feeding.¹⁰⁸ Its more specific Malta Declaration on Hunger Strikers nonetheless permits physicians to attend a prison hunger striker in the context of a traditional physician-patient relationship if consent and confidentiality can be maintained. The WMA's definition of a hunger strike is much broader than that of the Red Cross, in that it does not require a specific goal.¹⁰⁹

It is the position of the United States that the Geneva Conventions do not apply to the prisoners at Guantanamo and that military commanders can lawfully order physicians to force-feed prisoners held there for political purposes. Both positions are wrong as a matter of human rights law and medical ethics. It is, for example, a violation of medical ethics for military physicians to treat their competent prisoner-patients against their will solely for military or political purposes. The Department of Defense seems to understand this, and so has publicly relied on two basic rationales for ordering military physicians to force-feed prisoners: it is in the best medical interest of prisoners, and it is done in accordance with U.S. Department of Justice Bureau of Prisons hunger strike regulations that apply to prisoners in federal prisons.¹¹⁰

Implications of Starvation Induced Psychological Changes for the Ethical Treatment of Hunger Strikers, 29 J. MED. ETHICS 243, 245 (2003) (discussing psychological changes that can result from prolonged starvation and their implications for the validity of hunger strikers' consent).

¹⁰⁷ Oguz & Miles, *supra* note 106, at 169.

¹⁰⁸ See World Med. Ass'n, *Declaration of Tokyo*, May 2006, available at <http://www.wma.net/e/policy/c18.htm> ("Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially.").

¹⁰⁹ See World Med. Ass'n, *Declaration on Hunger Strikers*, Oct. 2006, available at <http://www.wma.net/e/policy/h31.htm> (suggesting that not all hunger strikers have the same goals and that only some engage in hunger strikes as "a form of protest" or "to obtain certain goals"). The WMA Declaration was recently amended in October 2006. A previous version of the WMA's Declaration – the version to which physicians at Guantanamo would have referred when restraint chairs were introduced there – defined "a hunger striker as 'a mentally competent person who has indicated that he has decided to embark on a hunger strike and has refused to take food and/or fluids for a significant interval.'" Fessler, *supra* note 106, at 244.

¹¹⁰ See, e.g., William Winkenwerder, Assistant Sec'y of Def. for Health Affairs, Media Roundtable (June 7, 2006), available at <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=33>. Edmund (Randy) Howe, who teaches medical ethics at the Uniformed Services University of the Health Sciences in Bethesda, Maryland, told a conference on war, torture, and terrorism in Philadelphia on November 17, 2006, that during a recent visit to Guantanamo, he was told that the rationale for force-feeding now being used

Both arguments seem reasonable, but neither fits the facts at Guantanamo. The first is acceptable if it applies only to prisoners who are not actually on hunger strikes (as defined by the Red Cross), but who have stopped eating because of a mental illness, such as depression, and reasonably can be declared incompetent to refuse treatment, including forced feeding, if and when such feeding is necessary to sustain their lives or health. So to the extent that an individual competency assessment has been properly conducted and the prisoner is found to fit into this category, forced feeding is medically indicated. This category is not likely to apply to many prisoners at Guantanamo, however. As General Jay W. Hood told a group of visiting physicians in the fall of 2005, the prisoners at Guantanamo are “protesting their confinement and are not suicidal.”¹¹¹ Of course Hood may be wrong, and it is reasonable to assume that at least some of the prisoners at Guantanamo see suicide as their only way out.

The second argument requires a closer examination of the Bureau of Prisons hunger strike regulations.¹¹² These regulations are triggered when the hunger striker “communicates [the fact that he is on a hunger strike] to staff and is observed by staff to be refraining from eating for a period of time, ordinarily in excess of 72 hours.”¹¹³ Upon referral for medical evaluation, the inmate shall have a medical and psychiatric exam and be placed “in a medically appropriate locked room for close monitoring” if necessary to accurately measure food and fluid intake and output, where weight and vital signs are monitored at least every twenty-four hours.¹¹⁴ If and when the “physician determines that the inmate’s life or health will be threatened if treatment is not initiated immediately,” the physician “shall make reasonable efforts to convince the inmate to voluntarily accept treatment,” including explaining the risks of refusing, and must document these efforts.¹¹⁵ After such efforts (or in an emergency), if “a medical necessity for immediate treatment of a life or health threatening situation exists, the physician may order that treatment be administered without the consent of the inmate.”¹¹⁶

is twofold: (1) there is peer pressure on the hunger-striking prisoners, who are therefore not fasting voluntarily; and (2) the prisoners have been trained not to eat to win over others around the world to their cause (i.e., it is a tactic to further their war effort). If these are, in fact, two additional rationales, they remain deficient. Force-feeding only plays into the enemies’ hands by confirming our ruthlessness, and even if there is peer pressure, it does not justify medically assisted feeding until the prisoner begins to deteriorate and requires assistance from a medical point of view.

¹¹¹ Susan Okie, *Glimpses of Guantanamo – Medical Ethics and the War on Terror*, 353 NEW ENG. J. MED. 2529, 2531 (2005).

¹¹² See 28 C.F.R. §§ 549.60-.66 (2006).

¹¹³ *Id.* § 549.61.

¹¹⁴ *Id.* §§ 549.62-.63.

¹¹⁵ *Id.* § 549.65.

¹¹⁶ *Id.*

Whether or not one thinks these are reasonable regulations, only a physician (not the warden) is permitted to make treatment decisions under them, and then only after reasonable attempts to get voluntary compliance.¹¹⁷ To the extent that military commanders are making the decisions about force-feeding, the Bureau of Prison rules are not being followed at Guantanamo. This may be the reason that the previous commander of the medical group responsible for prisoner health care, Navy Captain John S. Edmondson, said that military health care personnel are screened before they are deployed to Guantanamo “to ensure that they do not have ethical objections to assisted feeding.”¹¹⁸ In addition, under the Bureau of Prison rules, seventy-two hours of fasting triggers a medical evaluation;¹¹⁹ it does not trigger emergency force-feeding, which generally requires weeks, if not months, of continuous fasting.

C. *Medical Ethics and No Longer Competent Hunger Strikers*

The much more complex medical ethics question is what a physician should do after the competent hunger striker becomes incompetent, and it reasonably appears that the hunger striker will die or sustain permanent injury if he continues to refuse food, and there is no reasonable possibility that his demands will be met. Two ethics positions have been articulated, neither of which is terribly persuasive. The first position is that of the WMA in its Declaration on Hunger Strikers, which was amended in 2006. The previous version of the Declaration – and the one that physicians at Guantanamo would have relied upon during earlier hunger strikes – concluded that “when the hunger striker has become confused and is therefore unable to make an unimpaired decision or has lapsed into a coma, the doctor shall be free to make the decision for his patient as to further treatment which he considers to be in the best interest of that patient.”¹²⁰ The WMA nonetheless requires the physician to honor the patient-prisoner’s prior decision to fast to the death unless he had informed the prisoner of his inability to honor this wish and provided the prisoner with the chance to obtain another attending physician.¹²¹

The WMA’s new Declaration on Hunger Strikers continues to give physicians the ethical authority to act in the incompetent hunger striker’s “best interests” in the absence of advance directives from the hunger striker, and even to go against such a directive if the refusal is thought to have been made

¹¹⁷ *Id.* §§ 549.65-.66.

¹¹⁸ See Okie, *supra* note 111, at 2530.

¹¹⁹ 28 C.F.R. §§ 549.61-.62.

¹²⁰ World Med. Ass’n, *Declaration of Malta on Hunger Strikers*, Nov. 1991, reprinted in *ETHICAL CODES AND DECLARATIONS RELEVANT TO THE HEALTH PROFESSIONS: AN AMNESTY INTERNATIONAL COMPILATION OF SELECTED ETHICAL AND HUMAN RIGHTS TEXTS* 23, 25 (Amnesty Int’l ed., 2000).

¹²¹ *Id.*

under duress.¹²² On the other hand, the rights of competent hunger strikers to refuse forced feeding are made stronger in article 21:

Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting.¹²³

The position of the Royal Dutch Medical Association, drafted in response to hunger strikes by Vietnamese asylum seekers, is more specific and is designed to try to fill in some of the ambiguity of the earlier WMA policy. Specifically, it suggests that each hunger striker have access to a "doctor of confidence" who will act as his physician, keeping him fully informed of the medical consequences of the hunger strike, but will also carry out his wishes of non-treatment in the event of incompetence or coma.¹²⁴ To reduce uncertainty in the event of incompetence, the Dutch guidelines call for hunger strikers to sign a specific "statement of non-intervention," similar to a living will, that directs their care and refuses artificial or forced feeding in the event of incompetence. This written statement is not to be made public unless and until the prisoner-patient actually becomes incompetent.¹²⁵ Of course it would be nice if all prisoners had access to independent physicians, whether called doctors of confidence or not. The major problem at Guantanamo, however, is precisely that the only physicians any prisoner has access to are the military physicians at the base. No independent physician has ever been permitted to examine or treat a prisoner there. Moreover, the living will solution is no solution at all,

¹²² World Med. Ass'n, *supra* note 109, arts. 18-19.

¹²³ *Id.* art. 21. The first major legal case involving force-feeding since the October 2006 changes to the WMA's Declaration on Hunger Strikers was at the International Tribunal for the former Yugoslavia in late 2006, and involved an accused who went on a hunger strike during his trial to protest the proceedings. The tribunal ruled that physicians could proceed to protect "the health and welfare of the accused and avoid loss of life to the extent that such services are not contrary to compelling internationally accepted standards of medical ethics or binding rules of international law," and required the medical professionals involved (Dutch physicians) to "seek professional advice, both in terms of specialized medical expertise and ethics, domestically and internationally . . . [and review their treatment protocol to ensure that it] reflects in every respect the latest international medical and ethical standards." *Prosecutor v. Seselj*, Case No. IT-03-67, Urgent Order to the Dutch Authorities Regarding Health and Welfare of Accused (Dec. 6, 2006). For further examination into the role of physicians in hunger strikes, see *Nevmerzhitsky v. Ukraine*, [2005] Eur. Ct. H.R. 54825/90 (stating that "therapeutic necessity" can justify force-feeding if accepted medical standards are followed, but that force-feeding cannot be aimed at "humiliation" or "punishment," or inflict "severe physical suffering").

¹²⁴ JOHANNES WIER FOUND. FOR HEALTH & HUMAN RIGHTS, ASSISTANCE IN HUNGER STRIKES: A MANUAL FOR PHYSICIANS AND OTHER HEALTH PERSONNEL DEALING WITH HUNGER STRIKERS 29-30 (1995).

¹²⁵ *Id.* at 31-32.

since it suggests that the prisoner might have made arrangements with his physician to “save” him before he suffers death or serious harm, and so undercuts the power of the hunger strike itself.¹²⁶

U.S. military officials have made it clear that they will not permit anyone at Guantanamo to fast to death because of the likely international propaganda consequences, which are a global security risk. Since the first three suicides by hanging at Guantanamo in June 2006, however, this rationale no longer exists. All three of these prisoners had been on hunger strikes at one time or another, and at least one of them, Ali Abdullah Ahmed, had been repeatedly subjected to the emergency restraint chair.¹²⁷ Dr. Winkenwerder’s position that the military can rewrite the WMA’s Declaration on Hunger Strikers to permit earlier intervention because it “only just makes good sense” to force-feed hunger strikers before they become incompetent or “near death” is also not persuasive.¹²⁸ “Preventive treatment” can be seen as reasonable in some settings with the patient’s consent, but where the real prevention is simple eating and the prisoner is on a hunger strike, force-feeding is not treatment but simply punishment for an undesirable behavior.

Preventing the deaths of incompetent prisoners is a laudable medical goal. Use of the emergency restraint chairs for force-feeding competent prisoners, however, can never be ethically, legally, or medically justified. And even in the case of an incompetent suicidal prisoner, whose condition was determined by a qualified psychiatrist, the use of the restraint chair would be unethical and illegal. This is because any prisoner who needs to be forcibly restrained in this device for force-feeding is almost certainly strong enough to be in little or no health danger from continuing his fast. The primary justification for use of this device seems to be to use force-feeding as punishment and intimidation rather than as medical care. The use of any medical intervention as punishment is

¹²⁶ See George J. Annas, *Hunger Strikes: Can the Dutch Teach Us Anything?*, 311 BRIT. MED. J. 1114, 1115 (1995).

¹²⁷ See Felicity Arbuthnot, *This Pitiless Age: Felicity Arbuthnot Investigates the Deaths of Three Guantanamo Inmates*, MORNING STAR (London), July 15, 2006; David S. Cloud & Neil A. Lewis, *Prisoners’ Ruse Is Inquiry Focus at Guantanamo*, N.Y. TIMES, June 12, 2006, at A1; Obituary, *Yasser Talal al-Zahrani*, ECONOMIST, June 17, 2006, at 92. A fourth suicide, about a year later, was also committed by a persistent hunger striker. William Glaberson & Margot Williams, *Pentagon Files Offer Details on Detainee in Suicide*, N.Y. TIMES, June 1, 2007, at A22.

¹²⁸ Winkenwerder, *supra* note 110; see also James Risen & Tim Golden, *Three Prisoners Commit Suicide at Guantanamo*, N.Y. TIMES, June 11, 2006, at A1 (contradicting military officials’ claims that force-feeding was necessary to save hunger strikers who were near death with evidence that restraint chairs were used on hunger strikers “regardless of their medical condition” and that few of the detainees being force-fed “were classified by doctors . . . as ‘severely malnourished’”).

prohibited by all relevant international treaties, medical ethics principles, and U.S. constitutional law.¹²⁹

The military physicians might reply that their sole motivation is medical treatment, not punishment, and that their intent should govern the characterization of their actions. Even if this rather bizarre argument was accepted, however, it raises another fundamental human rights violation, one also specifically prohibited by the holding of the Nuremberg Doctors' Trial and the second sentence of Article 7 of the ICCPR: "In particular, no one shall be subjected without his free consent to medical or scientific experimentation."¹³⁰ Since the emergency restraint chairs had never been used for medical treatment before, and were being used in this context like a new medical device to test the hypothesis that their use on prisoner-subjects would be more successful in breaking the hunger strike than the use of medically accepted means, it could be reasonable to consider the use of restraint chairs a medical experiment. When viewed in this way, the experiment has many of the characteristics of those conducted by the Nazi physicians, including its primary rationale – military wartime necessity – and its total lack of consent.¹³¹ And, of course, use of the chair is cruel and inhuman, regardless of the rationale.

D. *The Geneva Conventions and Force-Feeding*

I have had the opportunity to speak about force-feeding at Guantanamo to a number of physician audiences and have been repeatedly astonished at how many physicians identify with the military physicians at Guantanamo to the extent that they see nasogastric feeding of hunger strikers as routine and beneficent. Because of this experience, it is worthwhile to underline that the primary problem with force-feeding at Guantanamo does not lie in the technique of using a nasogastric tube (at least if the proper size tube is used in a medically appropriate manner), but rather in its forced use on a competent prisoner who is put in six-point restraints (although any restraints would be objectionable), and who is maintained in those restraints for hours of "post-feed observation" during which the prisoner must urinate and defecate on himself. This is punishment, not treatment, and seems to be motivated by

¹²⁹ See *supra* notes 16, 94, 100, 109 and accompanying text. The American Nurses Association, unlike the American Medical Association, has no position on the ethics of force-feeding, and the Navy nurses at Guantanamo do not consider the force-feeding there unethical. See Janet Boivin, *Force-Feeding at Guantanamo Bay Raises Ethical Issues*, NURSE.COM, Apr. 2, 2007, <http://news.nurse.com/apps/pbcs.dll/article?AID=/20070409/PHILADELPHIA09/304090001&SearchID=7328482585011>.

¹³⁰ ICCPR, *supra* note 2, art. 7.

¹³¹ See generally THE NAZI DOCTORS AND THE NUREMBERG CODE, *supra* note 18 (discussing the Nazi doctors who justified murder and torture as human experimentation). It is, of course, not murder and torture being justified as medical experimentation here, but cruel and inhuman treatment being justified as medical treatment.

military commanders specifically for humiliation and subjugation, not by physicians for a health benefit.

In any event, there seems to be real tension between the physicians at Guantanamo, most of whom are under the command of the Navy at the hospital, and the Army commanders who are in charge of the prisoners and their interrogations. It is often argued that a physician in the military seldom, if ever, needs to choose between being a military officer first and a physician second, or being a physician first and a military officer second.¹³² At Guantanamo, however, the choice is stark. Military physicians cannot follow military orders to force-feed competent prisoners without violating basic precepts of medical ethics not to harm patients by using their medical knowledge. New Department of Defense medical instructions, dated June 6, 2006, acknowledge some of this by requiring, for example, that involuntary treatment “be preceded by a thorough medical and mental health evaluation of the detainee and counseling concerning the risks of refusing consent” to treatment and that any treatment “be carried out in a medically appropriate manner.”¹³³ Nonetheless, these instructions continue to permit force-feeding of mentally competent prisoners in emergency restraint chairs.¹³⁴

Guantanamo has been called a “gulag,” an “anomaly,” and a “legal black hole.”¹³⁵ The Supreme Court’s ruling in June 2006 that the Geneva Conventions have full force in Guantanamo as a matter of both U.S. and international law was widely hailed, especially by military attorneys.¹³⁶ The Court also ruled that Geneva’s Common Article 3 applies to all prisoners in U.S. military custody. It prevents not only the use of tribunals that are not “regularly constituted,” but also requires all prisoners to be “treated humanely” and explicitly prohibits “cruel treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”¹³⁷ Any reasonable reading of Common Article 3 would absolutely prohibit the use of emergency restraint chairs to force-feed prisoners, competent or not.

¹³² See generally Michael A. Grodin & George J. Annas, *Military Medical Ethics*, 352 NEW ENG. J. MED. 312 (2005) (reviewing MILITARY MEDICAL ETHICS (Thomas E. Beam et al. eds., 2003)).

¹³³ Dep’t of Def., Instruction No. 2310.08E, Medical Program Support for Detainee Operations ¶ 4.7.2 (2006), available at http://ftp.fas.org/irp/doddir/dod/i2310_08.pdf.

¹³⁴ *Id.* ¶ 4.7.1.

¹³⁵ See generally JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006).

¹³⁶ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-96 (2006). The JAGs, both active duty and retired, had unanimously opposed any movement by the U.S. military away from honoring the Geneva Conventions. See Neil A. Lewis, *Military Lawyers Prepare To Speak on Guantanamo*, N.Y. TIMES, July 11, 2006, at A14; Kate Zernike, *Military Lawyers Urge Protections for Detainees*, N.Y. TIMES, July 14, 2006, at A14.

¹³⁷ See Common Article 3, *supra* note 16.

Four of the Justices also ruled that the protocols to the Geneva Conventions, although not ratified by the United States, are binding international law.¹³⁸ This is significant, since the protocols specifically prohibit interference with actions by physicians that are consistent with medical ethics.¹³⁹ This means the use of restraint chairs to break a hunger strike by a competent prisoner would be prohibited in two ways: as “cruel treatment” and “humiliating and degrading treatment,” and also as a violation of medical ethics.

III. ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS STANDARDS

Although unfamiliar with or contemptuous of the Nuremberg Principles and the Geneva Conventions, administration lawyers nonetheless almost immediately understood that they and those who took their advice to disregard the Geneva Conventions in the “new kind of war” could be prosecuted criminally for “old kind of war” war crimes under the U.S. War Crimes Act.¹⁴⁰ As Alberto Gonzales put it in a memorandum to the President dated January 25, 2002, one advantage of determining that the Geneva Conventions did not apply to the Taliban is that such a presidential determination

- [s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).
 - That statute, enacted in 1996, prohibits the commission of a “war crime” by or against a U.S. person, including U.S. officials. “War crime” for these purposes is defined to include any grave breach of GPW [Geneva Convention III Relative to the Treatment of Prisoners of War] or any violation of common Article 3 thereof (such as “outrages against personal dignity”). Some of these provisions apply (if the GPW applies) regardless of whether the individual being detained qualifies as a POW. Punishments for violations of Section 2441 include the death penalty. A determination that the GPW is not applicable to the Taliban would mean that Section 2441 would not apply to actions taken with respect to the Taliban.

¹³⁸ See *Hamdan*, 126 S. Ct. at 2795-96 (asserting that Common Article 3 “applies . . . even if the relevant conflict is not one between signatories”). Justice Anthony Kennedy, who joined the five Justice majority, would have saved this issue for another day. See *id.* at 2808-09 (Kennedy, J., concurring in part) (arguing that the Geneva Conventions apply in this case “if for no other reason, because Congress requires that military commissions like the ones at issue conform to the ‘law of war’”).

¹³⁹ See *supra* note 71 and accompanying text.

¹⁴⁰ See 18 U.S.C. § 2441 (2006).

- Adhering to your determination that GPW does not apply would guard effectively against misconstruction or misapplication of Section 2441 for several reasons.
 - First, some of the language of the GPW is undefined (it prohibits, for example, “outrages upon personal dignity” and “inhuman treatment”), and it is difficult to predict with confidence what actions might be deemed to constitute violations of the relevant provisions of GPW.
 - Second, it is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism.
 - *Third, it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441. Your determination would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution.*¹⁴¹

But this determination ultimately was not self-protective enough for the administration officials who, at least after the disclosures at Abu Ghraib and Guantanamo, began to see themselves as human rights outlaws who might be brought to justice in their own country. As historian Arthur Schlesinger, Jr.

¹⁴¹ Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush, *supra* note 65, at 118-21 (emphasis added). The JAGs were intentionally kept out of the loop on this decision, but it was emphatically opposed by State Department lawyer William H. Taft, IV, who wrote in a February 2, 2002, memo to Gonzales refuting his January 25 memo:

The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions. . . .

. . . .
 . . . The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict – al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.

Memorandum from William H. Taft, IV, Legal Advisor, U.S. Dep’t of State, to Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), in *THE TORTURE PAPERS*, *supra* note 10, at 129, 129-30.

concluded in regard to the administration's legal defense of torture, "No position taken has done more damage to the American reputation in the world – ever."¹⁴² Administration lawyers worried that by their approval of torture they could come to be seen as traitors to American values, which would undercut the power and legitimacy of American forces abroad and allow a future administration to hold them accountable. Thus it came as little surprise that after *Hamdan* and just before the election of 2006, the administration quickly pushed the Military Commissions Act through Congress.¹⁴³ Mostly, the Act was a direct response to *Hamdan*. But it also explicitly provided administration officials and those who followed their advice on torture with immunity from prosecution under the War Crimes Act by granting the President the authority "to interpret the meaning and application of the Geneva Conventions."¹⁴⁴ The Act also redefined torture and other grave breaches under Common Article 3, making these new definitions (which, for example, would not cover the sexual humiliation at Abu Ghraib or much of the force-feeding at Guantanamo) retroactive to November 26, 1997, the date of the War Crimes Act.¹⁴⁵

During the brief debate on the Military Commissions Act, Senators John McCain, Lindsey Graham, and John Warner took the position that the law should not change the obligations of the U.S. armed forces under the Geneva Conventions, but only provide an exception to them for non-military personnel like the CIA (as Vice President Dick Cheney had previously argued).¹⁴⁶ In their insistence that the U.S. military follow the Geneva Conventions at all times, they were strongly supported by both current and former JAGs, as well as by former chairmen of the Joint Chiefs of Staff.¹⁴⁷ Both General Jack

¹⁴² See Mayer, *supra* note 11, at 46.

¹⁴³ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of U.S.C.). In addition to the JAGs, there are numerous examples of military attorneys doing their best to follow the law prior to enactment of the Military Commissions Act, especially by insisting on following the Geneva Conventions. See, e.g., Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, at A1; Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1. Commander Swift, who was assigned to defend Hamdan and ultimately brought the case before the Supreme Court, is a notable example. His zealous representation of his Guantanamo client cost him his military career. See Editorial, *The Cost of Doing Your Duty*, N.Y. TIMES, Oct. 11, 2006, at A26.

¹⁴⁴ Military Commissions Act § 6(a)(3), 120 Stat. at 2632.

¹⁴⁵ *Id.* § 6(b), 120 Stat. at 2633-35.

¹⁴⁶ See 152 CONG. REC. S10399-10400 (daily ed. Sept. 28, 2006) (statement of Sen. Warner) (asserting that the passage of the Military Commissions Act would not impact the content and authority of the Army Field Manual).

¹⁴⁷ See, e.g., Letter from Gen. Joseph Hoar et al. to John Warner, Chairman, Senate Armed Servs. Comm. & Carl Levin, Ranking Member, Senate Armed Servs. Comm. (Sept. 12, 2006) (opposing any attempt to redefine or avoid Common Article 3 and praising the Department of Defense, which in response to *Hamdan* "issued a Directive reaffirming that

Vessey and General Colin Powell wrote letters to McCain opposing any attempt to redefine or relax U.S. compliance with Common Article 3. Both cited *The Armed Forces Officer*, a book commissioned after World War II by General George C. Marshall, which Powell wrote is “used . . . to tell the world and to remind our soldiers of our moral obligations with respect to those in our custody.”¹⁴⁸ Among other things, the book lists a “[s]trong belief in human rights” as the first desired characteristic of “every military officer,”¹⁴⁹ and specifically instructs:

The United States abides by the laws of war. Its armed forces, in their dealings with all other peoples, are expected to comply with the laws of war in the spirit and to the letter. In waging war, we do not terrorize helpless non-combatants, if it is in our power to avoid so doing. Wanton killing, torture, cruelty, or the working of unusual and unnecessary hardship on enemy prisoners or populations is not justified under any circumstances.¹⁵⁰

Actual prosecution in the United States of administration lawyers and military physicians based on their complicity in torture seems unlikely and could also be avoided by the President granting immunity to everyone involved prior to leaving office. This may, however, be seen as just too embarrassing internationally. On the other hand, it has also proven embarrassing for the United States to have U.S. and German citizens seek to prosecute Donald Rumsfeld and others for war crimes involving torture at Abu Ghraib and Guantanamo in a German court under the theory of universal jurisdiction.¹⁵¹ An earlier attempt to get the German prosecutor to act was rejected on the grounds that the United States might take appropriate action itself.¹⁵² Now that

the military will uphold the requirements of Common Article 3 with respect to all prisoners in its custody”).

¹⁴⁸ Letter from Gen. John W. Vessey to Senator John McCain (Sept. 12, 2006); Letter from Gen. Colin L. Powell to Senator John McCain (Sept. 13, 2006). Among other things, Powell noted, “The world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk.” *Id.*

¹⁴⁹ DEP’T OF DEF., *THE ARMED FORCES OFFICER* 4 (1950).

¹⁵⁰ *Id.* at 261.

¹⁵¹ See Mark Landler, *12 Detainees Sue Rumsfeld in Germany, Citing Abuse*, N.Y. TIMES, Nov. 15, 2006, at A17; Adam Zagorin, *Charges Sought Against Rumsfeld over Prison Abuse*, TIME.COM, Nov. 10, 2006, <http://www.time.com/time/nation/article/0,8599,1557842,00.html> [hereinafter Zagorin, *Charges Sought*]. Most notably, the case against the defendants had been expanded from Abu Ghraib to include Guantanamo, with special reference to the case of Mohammed al-Qahtani, which was first described in Adam Zagorin, *One Life Inside Gitmo*, TIME, Mar. 13, 2006, at 21.

¹⁵² Zagorin, *Charges Sought*, *supra* note 151. One of the named defendants in the initial filing, Brigadier General Janis Karpinski, the commander of Abu Ghraib during the time the photographs were taken of prisoner abuse, has been dropped as a defendant and has offered to testify as a witness for the prosecution. See *id.*

retroactive immunity has been granted to U.S. officials, however, this no longer seems plausible. Unlike the initial request in 2004, the November 10, 2006, request includes not just those U.S. Department of Defense and military officers in charge of Abu Ghraib and Guantanamo, but also many of the lawyers who wrote the memos justifying the use of torture and cruel and inhuman treatment in these prison camps, including former U.S. Department of Justice lawyers Jay Bybee and John Yoo, Department of Defense General Counsel William James Haynes II, Vice President Cheney's Chief of Staff, David S. Addington, and Attorney General Alberto Gonzales.¹⁵³

It is assumed that the German court will refuse jurisdiction, and this seems probable. Nonetheless, in the human rights world "naming and shaming" is a revered tactic, and the portrait of a German prosecutor even considering war crimes and crimes against humanity charges against U.S. officials is astonishing, and certainly nothing the U.S. prosecutors at Nuremberg could even envision. It is well worth recalling that it was not just the physicians who were prosecuted for actions during World War II, but also German jurists. As General Taylor put it in his opening statement for the prosecution in *The Justice Case*:

The defendants and their colleagues distorted, perverted, and finally accomplished the complete overthrow of justice and law in Germany. . . . But the defendants are not now called to account for violating constitutional guaranties or withholding due process of law. On the contrary, the defendants are accused of participation in and responsibility for the killings, tortures, and other atrocities which resulted from, and which the defendants know were an inevitable consequence of, the conduct of their offices as judges, prosecutors, and ministry officials. These men share with all the leaders of the Third Reich – diplomats, generals, party officials, industrialists, and others – responsibility for the

¹⁵³ *Id.* These are the five lawyers most intimately involved in pushing the Bush torture policy through the White House and the Department of Defense. See, e.g., José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 175-79 (2006); Mayer, *supra* note 11, at 46 (describing the "singular role" of David Addington). The idea of circumventing the Geneva Conventions was reportedly Vice President Cheney's and was first discussed at a high level White House meeting on January 11, 2002. Addington provided the legal rationale for the Vice President's wishes because, as deputy White House counsel Timothy E. Flanigan, who was also at the meeting, put it, he saw his job as supporting "'the position of his client, the vice president.'" Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1. Of this group, John C. Yoo, one of two now out of the administration, has been the most aggressive in defending his actions in the context of "'a new kind of war against an enemy we haven't faced before.'" Adam Liptak, *Interrogation Methods Rejected by Military Win Bush's Support*, N.Y. TIMES, Sept. 8, 2006, at A1; see also Tim Golden, *A Junior Aide Had a Big Role in Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1. See generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

holocaust of death and misery which the Third Reich visited on the world and on Germany herself. They can no more escape that responsibility by virtue of their judicial robes than the general by his uniform.¹⁵⁴

This prosecution of German lawyers and judges seemed exactly right to the United States at Nuremberg, and many, if not most, Americans would see a similar prosecution of the lawyers who distorted the Nuremberg Principles, the Geneva Conventions, the Covenant of Civil and Political Rights, and the Convention Against Torture, among other laws, as reasonable also. As José Alvarez concluded after an examination of the torture memos, “[W]hen government lawyers torture the rule of law as gravely as they have done here, international as well as national crimes may have been committed, including by the lawyers themselves.”¹⁵⁵

There are other actions short of criminal prosecution that can be taken against the lawyers and physicians complicit in torture. In 1993, I proposed with my colleagues Michael Grodin and Leonard Glantz the establishment of an International Medical Tribunal that could hear cases and publicly condemn the actions of individual physicians who violate international standards of medical ethics.¹⁵⁶ Even though such a tribunal would not be able to punish with criminal sanctions, its decisions could result in the professional isolation of physicians and be a powerful deterrent to grossly unethical conduct.¹⁵⁷ It

¹⁵⁴ 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 31-32 (1951). *Contra* David B. Rivkin Jr. & Lee A. Casey, *German for Chutzpah*, WALL ST. J., Apr. 16, 2007, at A15 (criticizing Germany for “taking a newly assertive role in attempting to define permissible international conduct”).

¹⁵⁵ Alvarez, *supra* note 153, at 223. For a discussion of the dangers of replacing the rule of law with ideology, see generally Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469 (2007).

¹⁵⁶ Michael A. Grodin, George J. Annas & Leonard H. Glantz, *Medicine and Human Rights: A Proposal for International Action*, 23 HASTINGS CENTER REP. 8, 11 (1993); *see also* George J. Annas & Michael A. Grodin, *Medical Ethics and Human Rights: Legacies of Nuremberg*, 3 HOFSTRA L. & POL’Y SYMP. 111, 119-20 (1999); George J. Annas & Michael A. Grodin, *Medicine and Human Rights: Reflections on the Fiftieth Anniversary of the Doctors’ Trial*, in HEALTH AND HUMAN RIGHTS 301 (Jonathan M. Mann et al. eds., 1999); Luis Justo, *Doctors, Interrogation, and Torture*, 332 BRIT. MED. J. 1462, 1463 (2006) (“An international medical tribunal could initially act by making public statements denouncing doctors who have committed documented violations of human rights, but could also use its influence to urge national medical associations to revoke such doctors’ license to practise. It would be a demanding task, but it would be worth the international effort to do it.”).

¹⁵⁷ Critics argue that our proposal is unnecessary and perhaps counterproductive in the presence of the new International Criminal Court. *See, e.g.*, Benjamin Mason Meier, *International Criminal Prosecution of Physicians: A Critique of Professors Annas and Grodin’s Proposed International Medical Tribunal*, 30 AM. J.L. & MED. 419, 421 (2004). Although we strongly support the International Criminal Court, we do not believe a parallel court – with or without criminal sanction – which addressed itself specifically to professionals licensed by the state (most notably physicians, but lawyers as well) would

would seem equally worthwhile to have an International Legal Tribunal to hear cases brought against attorneys and judges who misuse their profession to encourage the commission of war crimes and crimes against humanity. Unlike a criminal tribunal, in which charges would have to be proven beyond a reasonable doubt, and in which additional defenses, including good faith interpretation of the law or medical ethics, would be available, these due process elements would not be present before the proposed professional tribunal.¹⁵⁸ This is not only because criminal penalties could not be imposed, but primarily because the goal is deterrence and protection of the public, not punishment. In this arena, proof of complicity by preponderance of the evidence would be sufficient, and no defense of good faith would be available – because true believers threaten to harm the public (and the rule of law and the precepts of medical ethics) as much as ignorant or incompetent lawyers and physicians do. One measure of this harm is our country's reputation in the world. Another is our military's ethical standards. A 2006 survey of battlefield ethics conducted on U.S. military personnel in Iraq, for example, found that only 47% of U.S. army soldiers and only 38% of Marines agreed that non-combatants should be treated with dignity and respect; and more than one-third of both soldiers and Marines believe that torture should be allowed to save the life of a fellow soldier (more than 40%) or to obtain important information about insurgents (slightly less than 40%).¹⁵⁹

interfere with the ICC in any meaningful way. Moreover, such a parallel court would be an even more powerful influence on the professions because of its more specific mandate.

¹⁵⁸ John Yoo, for example, could defend his torture memos to a criminal tribunal as he has done in public, arguing that he was not outcome-oriented at all, but just giving his honest opinion of what the law is. As he told a Frontline interviewer on July 19, 2005,

At the Justice Department, I think it's very important not to put in an opinion interpreting a law on what you think the right thing to do is, because I think you don't want to bias the legal advice with these other considerations. . . . I don't feel like lawyers are put on the job to provide moral answers to people when they have to choose what policies to pursue. For example, it's not the Justice Department's job to say: "Here are the things you should do. We have conducted this examination of interrogation techniques worldwide, and these are the 10 that seem to work best. And so go ahead and do those."

Quoted in Frontline: The Torture Question (PBS television broadcast Oct. 18, 2006), available at www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html. The narrator for this program on torture begins it by asserting that lawyers "were the first combatants in the war on terror."

¹⁵⁹ MENTAL HEALTH ADVISORY TEAM IV, OFFICE OF THE SURGEON, MULTINATIONAL FORCE-IRAQ & OFFICE OF THE SURGEON GEN., U.S. ARMY MED. COMMAND, OPERATION IRAQI FREEDOM 05-07: FINAL REPORT 35 (2006), available at http://www.armymedicine.army.mil/news/mhat/mhat_iv/MHAT_IV_Report_17NOV06.pdf. David Petraeus, the Commanding General in Iraq, responded to the survey when it was released in May 2007 by asserting that the military must "redouble" its education efforts because our troops "can never sink to the level of the enemy." Brian Murphy, *Petraeus Expresses Concern over Ethics Report*, ARMYTIMES.COM, May 10, 2007, <http://>

In the absence of such an international forum, the other primary avenue available is the licensing board responsible for granting the medical or legal license. In the case of physicians, for example, an action seeking the revocation of a physician's license could be brought before the medical board. Licensure revocation is an action taken not to punish a physician, but to protect the public. It is not a criminal proceeding, and thus the due process rules of a criminal proceeding do not apply. Although the few times that this has been tried to date have not been successful, this has been primarily because the board has seen the action as primarily political rather than ethical.¹⁶⁰ In the case of a military physician who was responsible for treatment of prisoners at Guantanamo, the California medical licensing board has refused to hear the case because it believes the case should be heard, if at all, by the military itself.¹⁶¹ I think the California licensing board is simply wrong about this. Physicians cannot practice in the military unless they are licensed by a state licensing board. Retention of that license requires conformance with the precepts of medical ethics; when these are violated, even – or perhaps especially – in compliance with the wishes of the state, revocation or suspension of a medical license is completely appropriate.¹⁶²

www.armytimes.com/news/2007/05/ap_petraeus_070507/. In reference to “the torture and humiliation of prisoners at . . . Abu Ghraib,” Petraeus acknowledged that “[w]e have done that at times in theater and it has cost us enormously.” *Id.* In addition, he urged that “[t]roops should recall their shared higher values that ‘put us above the enemy,’ . . . such as ‘observing the law of land warfare and the norms that civilized nations have adopted governing the conduct of land warfare.’” *Id.*

¹⁶⁰ See, e.g., *Thorburn v. Dep’t of Corr.*, 78 Cal. Rptr. 2d 584, 590-91 (Cal. Ct. App. 1998) (holding that participation by physicians in lethal injection executions under state law is not unprofessional conduct that a state medical licensing board can use to discipline a physician because the legislature contemplated and approved such participation). See generally Joan M. LeGraw & Michael A. Grodin, *Health Professionals and Lethal Injection Execution in the United States*, 24 HUM. RTS. Q. 382 (2002) (asserting that physicians’ participation in lethal injections violates medical ethics).

¹⁶¹ The complaint against John S. Edmondson was filed with the California Medical Board on July 6, 2005, and alleged a variety of medical ethics violations in the treatment of prisoners. See Janice Hopkins Tanne, *Lawyers Will Appeal Ruling That Cleared Guantanamo Doctor of Ethics Violations*, BMJ.COM, July 23, 2005, <http://www.bmj.com/cgi/content/full/331/7510/180-b>. There are, of course, very difficult logistical problems should the Board ultimately proceed with this or any other similar complaint, most involving access to medical records and to the patient-prisoners themselves. Edmondson was reassigned in January 2006 (he had been the head of the hospital at Guantanamo since July 2003) and replaced by Captain Ronald Sollock, who had previously served in the Medical Inspector General’s Office. Stacey Byington, *Sollock Takes Command of Naval Hospital*, GUANTANAMO BAY GAZETTE, Jan. 13, 2006, at 3.

¹⁶² This is, of course, true of lawyers as well, and complaints of complicity or aiding and abetting in the commission of war crimes serve equally as justification for revoking attorneys’ licenses.

We are all the victims of state-employed lawyers and military physicians who have become human rights outlaws. But the individuals who have suffered torture and cruel and inhuman treatment facilitated by them or actually ordered or conducted by them deserve more than simply to bring them to justice. They deserve not only a public acknowledgement of the unlawful and unethical abuse inflicted on them, but also just compensation for their injuries.¹⁶³

CONCLUSION

Preventing torture and cruel and inhuman treatment is everyone's business, but three professions seem especially well-suited to prevent torture: physicians, lawyers, and military officers. Each also has special obligations. Physicians have special obligations because of their universally recognized and respected role as healers. Lawyers have special obligations to respect and uphold the law, including international humanitarian law. And military officers have special obligations to follow the international laws of war, including the Geneva Conventions. Any violation of international human rights law, especially a grave violation of the Geneva Conventions, or aiding and abetting the violation thereof, should be sufficient grounds for a licensing authority to question the person's fitness to be a physician or lawyer, and those found to be human rights outlaws should lose their privilege to practice their professions.

The challenges of the war on terror present an opportunity for medical and legal professional organizations to work together transnationally to uphold both medical ethics and international human rights law rather than manufacture rationales to undermine them.¹⁶⁴ The war on terror also provides an opportunity for military physicians and military lawyers, who are also military officers, to clarify their roles in the military and their obligations under global precepts of medical ethics and the requirements of international law.

¹⁶³ So far, efforts to obtain compensation have been unsuccessful. *See, e.g., In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).

¹⁶⁴ Two non-governmental organizations dedicated to doing this are Physicians for Human Rights and Global Lawyers and Physicians.